No. 73-732

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In the Supreme Court of the United States

OCTOBER TERM, 1973

DOUGLAS DALE SUTTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that, because he offered to stipulate that he knew the nature and characteristics of marijuana, it was error to admit in evidence three marijuana cigarettes found on his person following discovery of a large quantity of marijuana in the trunk of the automobile he was driving.

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to three years' probation and required to pay a $500 fine. The court of appeals affirmed (Pet. App. A).

On September 21, 1972, petitioner rented an automobile in San Diego, drove to Mexico and later that day

returned to the United States. He was stopped at the border patrol checkpoint located on Interstate Highway 5 near San Clemente (G. Ex. 8; Tr. 5, 27, 43-45, 8). He was the sole occupant of the vehicle, which had a suitcase in the back seat (Def. Ex. A; Tr. 9, 19-20).

At the station, a border patrol agent referred the car for secondary inspection because there was a greater likelihood of aliens being present in rented cars (Tr. 4-5). Agent Alvin R. Francis, checking the secondary lanes for aliens, asked petitioner to open the trunk of the car (Tr. 7-9). He observed petitioner, who was somewhat nervous, step from his car and attempt to get the trunk key into the lock. The trunk key would not fit, and Agent Francis was likewise unsuccessful in opening the trunk (Tr. 9-10). Two agents then removed the back seat and a cardboard divider and observed a large quantity of a substance which smelled like marijuana (Tr. 11). The trunk was then opened by a locksmith and found to contain a white plastic bag and three Mexican flour sacks, with a combined weight of about 100 pounds, filled with what was stipulated at trial to be marijuana (G. Exs. 1, 2, 2A, 2B; Tr. 18-19, 45). Petitioner was arrested and advised of his rights (Tr. 13). A search of his person disclosed three marijuana cigarettes in his shirt pocket (Tr. 13-14).

During a pretrial conference, defense counsel offered to stipulate that petitioner had knowledge of the general nature and characteristics of marijuana, provided the court "would refuse to allow testimony concerning the three marijuana cigarettes and refuse to receive said marijuana cigarettes in evidence" (Pet. App. C 3). The prosecutor declined the stipulation, and the trial court indicated that testimony concerning the cigarettes would be allowed. The court subsequently

charged the jury that petitioner was not on trial for possession of the three marijuana cigarettes and that such evidence was admitted and could be considered solely as circumstantial evidence indicating petitioner's knowing and intentional possession of the marijuana in the trunk (Tr. 58).

Petitioner contends that the introduction into evidence of the three marijuana cigarettes was prejudicial as evidence of a crime not charged and should have been excluded. He states that it was error for the prosecutor to refuse to accept a stipulation as to petitioner's knowledge of the characteristics of marijuana and for the court to permit introduction of the cigarettes after the stipulation had been offered. This contention is without merit.

The three marijuana cigarettes, discovered on petitioner's person at the same time the marijuana was discovered in the trunk, were a probative circumstance surrounding the commission of the crime charged and were admissible, as the court instructed, to show knowledge and intent. See *Deck* v. *United States,* 395 F.2d 89, 91 (C.A. 9). See also *DeCarlo* v. *United States,* 422 F.2d 237, 239-240 (C.A. 9). The prosecutor understandably rejected petitioner's offer to stipulate as to his knowledge of the characteristics of marijuana if the three cigarettes were excluded. Such a stipulation, in exchange for exclusion of the cigarettes, would have aided petitioner in disavowing knowledge that the trunk of his rented car contained marijuana—a more dubious claim in view of his simultaneous possession of the cigarettes. In any event, a litigant is not required to accept an offered stipulation as to any relevant issue. See, *e.g., United States* v. *Brickey,* 426 F.2d 680, 686 (C.A. 8); *United States* v. *Mishkin,*

317 F.2d 634, 638 (C.A. 2); *Alire* v. *United States*, 313 F.2d 31, 34-35 (C.A. 10); *Parr* v. *United States*, 255 F.2d 86, 88 (C.A. 5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.